

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-184555

DATE: May 26, 1976

MATTER OF: Universal American Enterprises, Inc.

DIGEST:

1. Provisions of Army Regulation No. 235-5 are not binding upon Army policy decisions to utilize "in-house" capability rather than contracting out for services when such services are to be performed in a foreign country.
2. OMB Circular A-76 expresses policy guidance with respect to whether certain services should utilize "in-house" capability or be purchased from commercial sources, but alleged failure of agency to comply with circular criteria is not for consideration under GAO bid protest procedures.

Universal American Enterprises, Inc. (Universal), protests the decision by the Department of the Army to convert its facilities maintenance and engineering program for the Eighth United States Army (EUSA), Korea, from a partially contractor-operated to a direct "in-house" United States Government operation.

Facilities engineering support in Korea is carried out by Army employees and contractors. There were seven designated geographic facilities engineering areas within EUSA, Korea. Three areas used direct-hire Army employees and four used service contract employees. The latter were employed under service-type contracts held by United States Invited and United States Invited/Korean Joint Venture firms. The United States Army Korean Procurement Agency awarded and administered facilities engineering contracts for these areas to provide management, operation, maintenance and repair of real property facilities. Such contracts also included operation and maintenance of water, sewage and electric systems; maintenance of buildings; providing services of fire prevention and protection; and aircraft crash rescue.

After competitive bidding, Universal was awarded contract DAJB03-79-C-5003 (& 5002) on June 14, 1974, to perform the facility engineer services in the central sector of Korea for the period from July 1, 1974, to June 30, 1975. This contract was extended to September 30, 1975, and amended to provide for a 1-month extension upon written notice at least 30 calendar days prior to the expiration period for final contract administration.

B-184555

Universal contends that the Army decision to discontinue contracting for facility engineering services was illegal and not made in accordance with the provisions of Army Regulation (AR) No. 235-5, 30 November 1972, as amended, and Office of Management and Budget (OMB) Circular No. A-76, Revised, August 30, 1967. In this regard, Universal alleges that the guidelines set forth in these documents had to be met before implementation of any conversion from a contractor operation.

On the basis of its contract performance, Universal states that:

"* * * our contract operations are, by any reasonable comparison, more efficient, than an in-house operation to which the Army has converted. Our operations not only have less deficiencies than an in-house operation but are far cheaper since our prices are based on true market conditions. Also we maintain that our contract is most definitely not a personal services contract and therefore not in violation of any Civil Service Laws."

Army approval of the plan to convert the facility engineer service contracts to direct-hire after October 1, 1975, was obtained during June 1975. This decision was said to be based on the need to correct deficiencies experienced under contractor operations which had existed prior to and after the award of Universal's contract. The facilities engineering service contracts were first used in 1957 to offset a 30-percent reduction in direct-hire engineering personnel. However, contract operations were expanded over the years until by 1974 about 2,400 persons were working indirectly for the Government through cost-plus-a-fixed-fee contracts valued at about \$7 million.

In December 1973, a United States Army Audit Agency report noted many deficiencies incurred under this method of obtaining services. Subsequently, a General Accounting Office (GAO) audit on Army facilities maintenance and engineering in Korea was instituted late in 1974. This study generally found that the maintenance was substandard and indicated that the problem was basically related to the system of contracting for the services. It concluded that such contracts resulted in ineffective and inefficient expenditure of funds and questionable safeguards of Government property. These views were concurred in by the Army when draft memoranda of GAO's initial findings were submitted to EUSA, Korea, for comment. The initial findings and the Army's response were formally incorporated

in GAO's report, "Army Facilities Maintenance and Engineering In Korea" (LCD 76-310, October 10, 1975). In addition, an unrelated investigation by the Corps of Engineers had also criticized the contractor operations and cited the violations of the personal service regulations as problems which required correction.

The record indicates that in performance of its referenced contract, Universal was often rated "highly satisfactory" and never received a monthly rating of less than satisfactory. However, as one of several contractors, Universal's satisfactory performance of its contract would not constitute sufficient reason to invalidate the decision to end the system of contracting. It is apparent that the Army decision to perform "in-house" the major facility engineering services was based largely upon the similar overall findings reached by the three studies (supra) of the contractor system.

Universal has submitted detailed information showing why it feels that the Army decision was not made in accordance with the criteria authorizing conversions to "in-house" operations as set forth in its regulation AR 235-5 entitled "Management of Resources Commercial and Industrial-Type Functions." In this regard, we note that the pertinent portion in chapter I of AR No. 235-5 reads as follows:

"1-2. Scope and applicability. a. Except as indicated in c below, this regulation applies to all DA commercial or industrial-type functions funded by public appropriations (including working capital funds) which involve products or services used by the Army in the United States, its territories and possessions, the District of Columbia, and the Commonwealth of Puerto Rico."

Accordingly, any decisions to convert to "in-house" operations abroad, as in Korea, are not required to be governed by or subject to the provisions of AR No. 235-5. Therefore, any question as to compliance with the regulation would not affect the validity of any such decision.

The allegation has also been made by Universal that the Army's decision was not in accordance with the provisions of OMB Circular A-76, and its implementing regulations, which express policy guidance with respect to whether certain services should be provided "in-house" or purchased from commercial sources. While it is not clear that this circular is applicable to services to be performed in

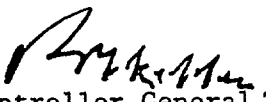
B-184555

foreign countries, nevertheless as we stated in American Federation of Government Employees Local No. 3347, AFL-CIO, B-183487, July 3, 1975, 75-2 CPD 12:

"OMB Circular A-76, while expressing policy guidance with respect to whether certain services should be provided in-house or purchased from commercial sources, is not a regulation in the sense that failure of an agency to comply may affect the validity of the procurement and, therefore, the issue presented is not properly for consideration under our bid protest procedures. See 53 Comp. Gen. 86 (1973); B-179943, December 26, 1973; and General DataComm Industries, Inc., B-182556, April 9, 1975. In that connection, in 53 Comp. Gen., supra, it was stated:

'* * * we have always regarded the provisions of Circular A-76 as matters of Executive policy which do not establish legal rights and responsibilities and which are not within the decision functions of the General Accounting Office. * * *'"

For the reasons set forth above, the protest is denied.


Deputy Comptroller General
of the United States